



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 13, 1996

William G. Burnett, P.E.
Executive Director
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR96-0701

Dear Mr. Burnett:

On February 6, 1996, this office issued Open Records Decision No. 639 (1996) which overruled Open Records Decision No. 592 (1991), returning the standard for judging the confidentiality of "commercial or financial information" under section 552.110 of the Government Code back to the test articulated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Because the businesses whose records are at issue here could not have been aware that this office was returning to the *National Parks & Conservation Ass'n* test, this office granted them additional time to make the factual and particularized showing required by *National Parks & Conservation Ass'n*. Manufactured Concrete Products Company ("MANCO") responded and their response was assigned ID# 39078.

The Texas Department of Transportation (the "department") received an open records request for information submitted with the Disadvantaged Business Enterprise ("DBE") Applications of MANCO and another company.¹ MANCO asserts that the information requested should be excepted from required public disclosure under section 552.110 as "confidential financial information."

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision.

¹We understand that the responsive information regarding this other company has been released to

In Open Records Decision No. 639 (1996), this office established that it would follow the *National Parks & Conservation Ass'n* test for judging the confidentiality of "commercial or financial information" which treats such information as confidential

if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F. 2d at 770 (footnote omitted). Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

MANCO's arguments against disclosure of the DBE information required by the department include the following:

- (1) it is one of only six manufacturers of prestressed concrete bridge beams in Texas and competition for sales is intense;
- (2) because of strict engineering standards, all manufacturers' beams are "virtually indistinguishable" and, consequently, "they are sold on the basis of the lowest price;"
- (3) "often, the difference in quotations between the low bidder and the next lowest bidder is less than one percent;"
- (4) disclosure will enable its competitors to determine its capacity to produce beams and their cost of production;
- (5) disclosure will give its competitors a "complete picture of all of [its] financial strengths and weaknesses which are proprietary and not available from any other source;"
- (6) disclosure will enable its competitors to "know the levels below which [it] cannot produce beams profitably and [its competitors] will be in a position to predict [its] minimum bids and to underbid [it];" and

(7) disclosure will allow its competitors to "know exactly the production levels they must achieve within their own prestressed concrete plants in order to have the ability to consistently underbid [it] and ultimately drive [it] out of business."

We conclude that MANCO has established that they fall within the second prong of the *National Parks & Conservation Ass'n* test and that most of the information at issue should be withheld from required public disclosure under section 552.110 of the Government Code. However, we cannot conclude that disclosure of MANCO's "Management Biographies" would cause substantial competitive injury to MANCO.

In summary, the department must release the document entitled "Management Biographies." The department must withhold the remainder of the requested information. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 39078

Enclosures: Submitted documents

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